

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

IN RE:  MR. AND MRS. GREGORY SWECKER,  Complainant,  vs.  MIDLAND POWER COOPERATIVE,  Respondent.	DOCKET NO. FCU-99-3 (C-99-76)
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**ORDER GRANTING REQUEST FOR FORMAL COMPLAINT PROCEEDINGS  
AND ASSIGNING TO PRESIDING OFFICER**

(Issued June 23, 1999)

**FACTS**

In mid-1998, Mr. and Mrs. Gregory Swecker installed a wind generator on their farm, located two miles west of Dana, Iowa, precipitating a dispute with their electric service provider, Midland Power Cooperative (Midland), over which tariff provisions should apply to the Sweckers' request for three-phase service<sup>1</sup>. Midland takes the position that the Sweckers must pay line extension charges and sign agreements under Midland's cogeneration tariff, identified as Tariff 26.16. Under this tariff, the line extension charges to the Sweckers would be \$5,712 and the

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<sup>1</sup> Letter from G. Swecker to M. Balch, Board staff, dated March 29, 1999. (All references are to materials in the Board's records in this docket.)

Sweckers would be charged \$86 per month in service charges, certain demand charges, and specified energy rates<sup>2</sup>.

The Sweckers believe they are entitled to three-phase service under Midland's Tariff 26.11<sup>3</sup>. Under these tariff provisions, the line extension charge would be \$2,500, the monthly service charge would be \$36, and no demand charges would apply, although the Sweckers would pay higher energy rates. Midland refuses to install three-phase service under this tariff because it believes the Sweckers intend to interconnect their wind generator to the system, which (according to Midland) requires the use of the cogeneration tariff.

The Sweckers dispute the applicability and reasonableness of the referenced cogeneration tariff provisions and claim the tariff makes their wind turbine an uneconomic proposition. Midland argues that its cogeneration tariff provisions are reasonable and permissible.

In the midst of this dispute, the Sweckers refused to pay the bills associated with their existing single-phase service because Midland would not provide them with three-phase service under Tariff 26.11<sup>4</sup>. Two regular monthly bills were rendered to the Sweckers by Midland without timely payment by the Sweckers. When Midland notified the Sweckers of a pending disconnection for nonpayment,

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<sup>2</sup> Letter from D. Borchers of Midland to G. Swecker, dated August 27, 1998; Midland Electric Tariff Sheet Nos. 94-94g.

<sup>3</sup> Midland Electric Tariff Revised Sheet Nos. 89 and 89a.

<sup>4</sup> Letter from G. Swecker to G. Mount of Midland, dated January 12, 1999.

the Sweckers delivered to Midland's after-hours drop box a check for \$2,889.30<sup>5</sup>. The memo line on the check indicated that \$389.30 of the payment was to be directed to their past-due account, while the remainder (\$2,500) was for the cost of a three-phase connection under Tariff 26.11. Midland refused to accept the check as written<sup>6</sup>. The Swecker's farm was disconnected for about a month until the Sweckers provided an unrestricted payment for the past-due amount (plus reconnection charges).

### **THE SWECKERS' COMPLAINT**

In complaints filed with the Utilities Board (Board) on March 30 and April 2, 1999, the Sweckers raise issues regarding the disconnection of their service, the reconnection charges, and the cogeneration tariff. The Sweckers state they have a farm, a wind generator, and other tools and equipment that require three-phase electric service. The Sweckers state they have requested and offered to pay for service under Tariff 26.11, which normally applies to residential and small farm commercial three-phase service. In the Sweckers' view, Midland failed to provide the requested service, failed to accept payment for the service, and disconnected all electrical services to the Sweckers' farm even though the Sweckers had tendered payment.

The Sweckers allege that Midland's disconnection of the Sweckers' service violated IOWA CODE § 476.21 (1999), which provides that an electric cooperative

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<sup>5</sup> Letter from G. Swecker to Midland, dated March 21, 1999.

shall not discriminate among its customers based on a customer's use of renewable energy sources. The Sweckers also rely on IOWA ADMIN. CODE 199-20.4(16)"c," which states that "failure to pay for a different class of public utility service" is an insufficient reason for denial of service.

The Sweckers argue that Midland has a duty to provide three-phase service to them as requested and that Midland has no right to discriminate on the basis of their use of renewable energy sources. The Sweckers also believe that Midland should be held responsible for damages. The Sweckers ask that the Board require Midland to provide them with three-phase service under Tariff 26.11, as requested, and that the Board find that Midland was not justified in disconnecting their single-phase service for nonpayment.

Prior to filing their complaints with the Board, on February 25, 1999, the Sweckers filed a petition with the Federal Energy Regulatory Commission (FERC) for enforcement pursuant to section 210(h) of the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. § 824a-3(h) (1994)<sup>7</sup>. The matter was docketed by the FERC as Docket No. EL-99-41-000. On May 14, 1999, the FERC issued its "Order Dismissing Petition For Enforcement Action" (the FERC Order), in which the FERC declined to exercise its authority to enforce PURPA as applied to Midland and "strongly urge[d]" the Sweckers and Midland to resolve their dispute through Alternative Dispute Resolution (ADR) procedures. FERC Order at p. 5.

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<sup>6</sup> Letter from D. Severson of Midland to G. Swecker, dated March 22, 1999.

<sup>7</sup> Letter from G. Swecker to FERC, dated February 10, 1999.

### **MIDLAND'S RESPONSE**

In its response filed April 16, 1999, Midland states it has not provided three-phase service to the Sweckers because the Sweckers have refused to pay the line extension charge and sign the agreement required under Midland's cogeneration Tariff 26.16. When compared with Tariff 26.11, Tariff 26.16 requires the installation of different equipment, execution of a cogeneration agreement, extra insurance coverage, and application of a different rate schedule<sup>8</sup>. Midland believes Tariff 26.16 is the applicable tariff section because the Sweckers intend to interconnect a wind generator, a form of cogeneration.

Midland states the Sweckers' single-phase service was disconnected because they failed to pay their electric bills for two months. Midland states the service was disconnected in compliance with Midland's filed tariffs and the requirements of the Board's rules relating to disconnection for nonpayment. Midland admits that one day prior to disconnection, the Sweckers left a check for \$2,889.30 in Midland's after-hours drop box. However, the check specified that \$389.30 was for the past-due bill and \$2,500 was for connection of three-phase service within five days. If Midland honored the check, it believed it would be agreeing to the Sweckers' terms for receiving three-phase service, including a date for performance that may have been impossible to meet (within five business

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<sup>8</sup> Letter from D. Severson of Midland to G. and B. Swecker, dated March 22, 1999; Note to Midland file from D. Borchers of Midland, dated August 19, 1998.

days). Accordingly, Midland argues it had no choice but to refuse the check in order to preserve its position regarding the application of its cogeneration tariff.

After receiving the Sweckers' restricted check, Midland states it took additional steps to alert the customer of the pending disconnection, including telephone calls, facsimile transfers, and a visit by a crew prior to disconnection, but service was eventually disconnected on March 22, 1999.

As noted above, the Sweckers also complain about Midland's reconnection charges. Midland states it is applying its normal, filed tariff charges applicable to all members in the event they are disconnected for nonpayment.

### **SWECKER REBUTTAL**

On April 19, 1999, Mr. Swecker filed a rebuttal to Midland's answer, generally re-emphasizing arguments already made.

### **BOARD STAFF'S PROPOSED RESOLUTION**

In a letter dated April 30, 1999, Board staff issued a Proposed Resolution pursuant to IOWA ADMIN. CODE 199-6.4. The Proposed Resolution summarized the events to date and concluded that the Board's authority regarding interconnection of wind generators, a form of Alternative Energy Producer under Iowa law, is limited to interconnections with rate-regulated electric utilities and does not extend to Midland, a cooperative that is not subject to the Board's rate regulation.

In the Proposed Resolution, Board staff also found that Midland was within its rights to refuse the Sweckers' restricted payment for a past-due bill. Under general principles of contract law, Midland might have been obligated to interconnect with and provide three-phase service to the Sweckers on their terms if Midland had accepted the check as written.

Finally, Board staff determined that Midland's disconnection and reconnection fees assessed to the Sweckers' single-phase service were justified. Since Midland was within its rights not to accept the Sweckers' restricted payment and the Sweckers' refused to tender an unrestricted payment for the past-due amount prior to disconnection, Midland's normal tariff provisions and the Board's disconnection rules would apply. In the Sweckers' situation, Board staff determined Midland correctly applied the disconnect and reconnect charges listed in its tariff.

### **THE SWECKERS' REQUEST FOR FORMAL COMPLAINT PROCEEDINGS**

In a letter filed May 5, 1999, the Sweckers reiterate their belief that Midland violated IOWA CODE § 476.21 by establishing rates and charges that are discriminatory toward renewable energy. The Sweckers also argue that IOWA CODE § 476.8 requires utilities to encourage the use of energy conservation and renewable energy services through their charges and services. The Sweckers disagree with the Proposed Resolution concerning the Board's jurisdiction to require Midland to provide three-phase service under Tariff 26.11. The Sweckers

subsequently asked Board staff to consider their letter to be a request for formal complaint proceedings.

The Sweckers also argue that the disconnection of their single-phase service violated IOWA CODE § 476.21 and IOWA ADMIN. CODE 199-20.4(16)“c” because, according to the Sweckers, Midland cannot discontinue service based on the Sweckers' intended use of renewable energy. The Sweckers maintain they tendered payment for three-phase service under Tariff 26.11 and, they argue, if any other customer had done the same, no disconnection would have occurred.

On May 7, 1999, Midland informed the Board staff by letter that it sees no new issues and relies upon its earlier statements in this record as its response to the Sweckers' request for formal complaint proceedings.

On May 19, 1999, the Consumer Advocate Division of the Justice Department (Consumer Advocate) asked the Board to delay action on the Sweckers' request for formal complaint proceedings while Consumer Advocate completed its analysis of certain information it had requested and received from Midland. Later on May 19, Consumer Advocate filed a "Request For Reconsideration Of The Proposed Ruling, Or In The Alternative, Joinder In Complainants' Request For The Establishment Of Formal Complaint Proceedings" (Consumer Advocate Request). Consumer Advocate states the FERC has declined to act on the Sweckers' petition for an enforcement proceeding, as shown by the FERC Order. Consumer Advocate argues that "the Board's regulatory



authority extends to issues related to the application of PURPA requirements to Midland and complainants' alternative energy production facilities." (Consumer Advocate Request at p. 3.)

## **ANALYSIS**

### **1. Standards For Initiating Formal Complaint Proceedings.**

Iowa Code § 476.3(1) governs the Board's actions with respect to complaints concerning the reasonableness of anything done, or omitted to be done, by a public utility subject to regulation under chapter 476. Section 476.3(1) provides, in relevant part, as follows:

When there is filed with the board by any person ... a written complaint requesting the board to determine the reasonableness of the rates, charges, schedules, service, regulations, or anything done or omitted to be done by a public utility subject to this chapter in contravention of this chapter, the written complaint shall be forwarded by the board to the public utility, which shall be called upon to satisfy the complaint or to answer it in writing within a reasonable time to be specified by the board. \* \* \* If the board determines the public utility's response is inadequate and there appears to be any reasonable ground for investigating the complaint, the board shall promptly initiate a formal proceeding.

Pursuant to this statute, if the Board believes Midland's response to the Sweckers' complaint is inadequate and there appears to be any reasonable ground for investigating the complaint, the Board will initiate a formal complaint proceeding

pursuant to IOWA ADMIN. CODE 199-6.5 et seq., with notice and an opportunity for hearing.

**2. The Cogeneration Interconnection Tariff.**

As stated in the Proposed Resolution, the Board's authority with respect to interconnections between customers using renewable energy sources and electric utilities was discussed in Iowa Power and Light Co. v. Iowa State Commerce Comm'n, 410 N.W.2d 236 (Iowa 1987). The Complainants and Consumer Advocate do not address this decision in their requests for formal complaint proceedings. Based on its own review of the applicable law, however, the Board concludes the Iowa Power decision does not prevent the Board from enforcing the requirements of IOWA CODE § 476.21.

The Iowa Power decision is distinguishable from the present matter in two significant respects. First, the Iowa Power Court was concerned only with the Iowa Alternate Energy Production (AEP) law, IOWA CODE §§ 476.41-.45, and did not address § 476.21. Thus, there is no finding that the statute at issue in this case is preempted by federal law.

Second, there is good reason to believe that § 476.21 is *not* preempted by federal law. The Iowa Power Court was reviewing Board action that established higher rates for purchases by utilities from AEPs than the rates set under the equivalent federal statute. This created a direct conflict between state and federal law. In this case, in contrast, the Iowa law is consistent with the federal statute;

both laws prohibit unreasonable discrimination against a customer based upon the customer's proposed or actual use of a renewable energy source. There is no preemption when the federal law and the state law are consistent. Matter of Guardianship & Conservatorship of Cavin, 333 N.W.2d 840, 841 (Iowa 1983); Powers v. McCullough, 258 Iowa 738, 140 N.W.2d 378, 382 (1966) ("An exercise by a state of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so direct and positive the two acts cannot be reconciled or consistently stand together. [Citations omitted.]")

The relevant federal statute, 16 U.S.C. § 824a-3(c), provides that an electric utility must sell power to a wind generator (in federal terminology, a qualifying facility or QF<sup>9</sup>) at rates that are "just and reasonable and in the public interest" and "do not discriminate against the [QF]."

The FERC regulations fill in the details of the federal statute. Electric utilities are obligated to interconnect with, buy power from, and sell power to QFs. See 18 C.F.R. § 292.303 et seq. FERC's rule 292.305 echoes the statutory requirements and adds a standard for determining when the rates for service to a QF may differ from the utility's other rates but still comply with the law. Specifically, Rule 292.305(a)(2) provides:

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<sup>9</sup> It is not clear in the record whether the Sweckers have certified their wind generator as a QF, but it is clear they could do so if they wished. Moreover, "failure to [file a QF certificate] does not affect the QF status of the facility." FERC Order at p. 3, n. 2.

Rates for sales which are based on accurate data and consistent systemwide costing principles shall not be considered to discriminate against any qualifying facility to the extent that such rates apply to the utility's other customers with similar load or other cost-related characteristics.

Under this regulation, an electric utility may establish separate rates for sales to QFs so long as those rates are (1) cost-based, (2) use the same cost methodology as the utility's other rates, and (3) applied to similarly-situated customers in a nondiscriminatory manner. The effect of the regulation is to clarify that the statute does not prohibit *all* rate differences between QFs and other customers. Only unreasonable differences are prohibited.

These federal standards are entirely consistent with IOWA CODE § 476.21, which provides in relevant part as follows:

A municipality, corporation or co-operative association providing electrical or gas service shall not consider the use of renewable energy sources by a customer as a basis for establishing discriminatory rates or charges for any service or commodity sold to the customer or discontinue services or subject the customer to any other prejudice or disadvantage based on the customer's use or intended use of renewable energy sources.

Like the federal statute, the Iowa statute prohibits discrimination against customers based on their use of a renewable energy source. Like the FERC, the Board interprets this as prohibiting unreasonable differences in the prices offered to most customers, on the one hand, and customers using renewable energy sources on the other. If the electric utility is able to prove cost-based justification for serving any

particular class of customers pursuant to different terms and conditions, then the utility is treating differently-situated customers in a different manner, an appropriate situation. It is only when the utility is not able to establish a neutral, cost-based rationale for its differing treatment that it may be said to discriminate among customers in an unlawful manner.

Because the state and federal laws are not in conflict, the Board is not preempted from enforcing IOWA CODE § 476.21. The Board has the jurisdiction to initiate a formal complaint proceeding to consider whether Midland's Tariff 26.16 unreasonably discriminates against customers using renewable energy sources in violation of IOWA CODE § 476.21.

The Board finds there are reasonable grounds for further investigation of this complaint. Midland's Tariff 26.16 imposes higher interconnection charges and less attractive service terms on customers using renewable energy sources. Midland has offered general justification for its different treatment of these customers, but there is no evidence in the record to indicate that the differences between Tariff 26.16 and Tariff 26.11 are cost-based, that they are based upon the same cost-of-service methodology that Midland uses in establishing its other rates, and that the tariffs are applied in a nondiscriminatory manner to similarly-situated customers. The Board will grant formal complaint proceedings and assign this matter to its presiding officer for a hearing at which Midland may offer evidence that its Tariff 26.16 is not unreasonably discriminatory in violation of IOWA CODE § 476.21,

particularly when compared to the terms and conditions for similar service under Midland's Tariff 26.11.

The Board's decision to investigate the cost support for Midland's Tariff 26.16 is buttressed by the FERC's decision to decline to initiate an enforcement proceeding under PURPA. FERC Order at p. 5. The remaining alternatives available to the Sweckers (federal district court, state court, and ADR) are unlikely to be efficient mechanisms for the resolution of the technical matters at issue. Few courts will have the ready expertise to review Midland's cost studies on an efficient basis, and many local ADR organizations are equally unprepared for a detailed review of a relatively technical matter of this nature. The Board has no doubt that a court or ADR organization could be educated to review the cost studies, but the Board already has expertise and experience it can apply to the issues in this matter.

The FERC has experience and expertise available to it that is at least the equal of the Board's, but the FERC apparently also has an established policy of declining to initiate enforcement proceedings in matters such as this. FERC Order at page 5. This does not mean the FERC has adopted a policy that the federal standards should not be enforced; on the contrary, the FERC Order expressly states that the federal law may be enforced in federal or state court. FERC Order at pages 3-4. With regard to state standards, nothing in the FERC Order prohibits the Board from enforcing state standards that are consistent with the federal standards.

Board resolution may be particularly appropriate in cases such as this, where judicial resolution appears to be a relatively inefficient option (particularly given the amounts at issue). The Board also notes that it is much closer to the geographic source of the complaint than the FERC, which further supports the view that the Board offers the most efficient forum to resolve these issues. For all of these reasons, it is appropriate that the Board review and decide this case under state law.

**3. The Disconnection Complaint.**

The Board also has jurisdiction over the other part of the Sweckers' complaint, relating to the disconnection of their single-phase service. IOWA CODE § 476.1A exempts electric cooperatives and corporations from the rate regulation authority of the Board, but such utilities are subject to all other regulation and enforcement activities of the Board. Accordingly, Midland's disconnection practices are within the Board's jurisdiction.

There is no material factual dispute with regard to this part of the Sweckers' complaint. The only issue is a legal question: Whether Midland was obligated to accept the check offered by the Sweckers for their past-due bills when acceptance of that check might also have obligated Midland to an unfavorable resolution of a disputed matter.

The Sweckers argue they should not have been disconnected for nonpayment because they tendered a check to Midlands for payment of their past-

due bills. Midland responds that it could not accept the check tendered by the Sweckers because it combined payment for the past-due bills with a disputed payment for installation of three-phase service at the Sweckers' farm.

Under the general principles of contract law, the amount of the check that exceeded the past-due amount for regular electric service could be considered an offer of a contract for installation of the interconnection for a payment of \$2,500. Thus, if Midland had accepted the check, the Sweckers could claim that Midland thereby agreed not to disconnect the Sweckers' single-phase service and to install the three-phase interconnection under Tariff 26.11, rather than Tariff 26.16. It seems likely that Midland was not required to accept a payment for overdue bills when payment was conditioned upon an adverse resolution of a disputed matter.

However, if the Board ultimately determines that Midland's Tariff 26.16 is unreasonably discriminatory and therefore violates IOWA CODE § 476.21, then the Board could also find that Midland was not justified in refusing the Sweckers' March 21, 1999, check. Under those circumstances, the Board could also find that Midland improperly collected a reconnection charge from the Sweckers and order a refund of that payment. The Sweckers' request for formal complaint proceedings on the issue of the reconnection charges will be granted to preserve these issues for Board consideration in connection with the tariff review.

Finally, the Board notes the Sweckers have from time to time asserted a claim for other damages, in addition to interconnection relief and refund of the



reconnection charges. The Board has jurisdiction to order refunds of overcharges and illegal charges in appropriate circumstances, Mid-Iowa Community Action, Inc. v. ISCC, 421 N.W.2d 899, 901 (Iowa 1988), but the Board does not have the authority to order other damages in this case.

### **CONCLUSIONS OF LAW**

1. The Board has jurisdiction of this request for formal complaint proceedings pursuant to IOWA CODE § 476.3(1).
2. The Board has jurisdiction to determine whether the terms of interconnection between a customer's wind generator and a cooperative association providing electrical service are unreasonably discriminatory, pursuant to IOWA CODE § 476.21.
3. The Board has jurisdiction of the Sweckers' complaint regarding disconnection of their single-phase electric service pursuant to IOWA CODE §§ 476.1A, 476.20, and 476.21.

### **ORDERING CLAUSES**

#### **IT IS THEREFORE ORDERED:**

1. The request for formal complaint proceedings filed on May 5, 1999, by Mr. and Mrs. Gregory Swecker is granted. The response of Midland Power Cooperative to the Sweckers' complaint with respect to the terms and conditions for three-phase interconnection of a renewable energy source is not adequate and

reasonable grounds for further investigation have been shown. Depending upon the outcome of that investigation, there may also be reasonable grounds for further investigation of the Sweckers' complaint with respect to Midland's refusal to accept their March 21, 1999, check.

2. This docket will be assigned to the Board's presiding officer to set a procedural schedule and conduct such further proceedings as may be necessary to determine: (a) Whether Midland Power Cooperative's Tariff 26.16 is in violation of the statutory standard in IOWA CODE § 476.21; (b) whether Midland Power Cooperative acted lawfully in refusing to accept the Sweckers' offered payment of March 21, 1999; and (c) to resolve any other issues that may arise.

3. Pursuant to IOWA ADMIN. CODE 199-6.7, the written complaint and all other materials and supplemental information from the informal complaint proceedings, identified as Docket No. C-99-76, are hereby made a part of the formal record of this proceeding.

**UTILITIES BOARD**

/s/ Allan T. Thoms

/s/ Susan J. Frye

ATTEST:

/s/ Raymond K. Vawter, Jr.  
Executive Secretary

/s/ Diane Munns

Dated at Des Moines, Iowa, this 23<sup>rd</sup> day of June, 1999.